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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER GENERAL MOTORS CORPORATION

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REPLY BRIEF FOR PETITIONER GENERAL MOTORS CORPORATION

Both in its opposition to the four-month rule, and in its arguments against the *American Cyanamid* remedy, the government's brief attempts to portray EPA's position as wholly predetermined by the statute—and *American Cyanamid*, in contrast, as a judicial frolic that ignores statutory requirements. Nothing could be further from the truth. Indeed, in order to achieve its purported harmony with the statute, the government is reduced to ignoring key statutory provisions and policies, contradicting the Agency's own well-established interpretation of other provisions, and even characterizing one provision of the statute as a "mistake." Obviously, none of these efforts are consistent with accepted principles of statutory interpretation.

INTRODUCTION

The government portrays EPA as a victim of the *Cyanamid* bar, and suggests that General Motors was trying simply to delay compliance. This portrayal is inaccurate and misleading. Because the government argues that the facts of this case illustrate the results of an enforcement bar (U.S. Br. 42), we are compelled to respond to the government's mischaracterization of the facts.

1. The government repeatedly states that GM waited until just before the 1985 deadline to request a SIP revision. (U.S. Br. 6, 7, 42, 43). That is flatly wrong. GM first requested an extension of time to 1987 in a letter to Massachusetts dated July 6, 1982. GM reiterated this request to the Commonwealth on November 20, 1984, and again on June 7, 1985. (J.A. 38-45).[1]

2. Contrary to the government's suggestion, GM's request for an extension of time was not made to seek an economic advantage over its competitors. (U.S. Br. 32, 42, 43). Instead, GM was seeking equal treatment under EPA's 1981 policy, which was designed broadly to "reduce the regulatory burden on the motor vehicle industry."[2] EPA had previously granted SIP revisions and similar technology waivers to Ford and Chrysler.[3] In reliance on EPA's policy,

[1] Massachusetts had to go through its own review as well as public comment on the SIP revision, and GM could not control the timing of the submission of the SIP revision by the Commonwealth. EPA was hardly surprised by a "last-minute SIP revision." Indeed, in *April 1985, EPA advised the Commonwealth that the GM extension should be submitted as a SIP revision.* Memorandum from J.L. Hanish, EPA Region I State Air Programs Branch Chief, dated May 19, 1986, at p. 2 ("Hanish memo") (copy lodged with the Clerk of the Court). It is noteworthy, moreover, that EPA's 1981 policy contains no deadline for requesting such extensions. (J.A. 30-37).

[2] J.A. 30. EPA's October 1981 policy statement was adopted to address the worsening economy and industry's difficulties in developing and installing needed air control technology in dozens of plants around the country (GM alone had 33 plants) as well as to encourage the use of innovative technology.

[3] *See, e.g.*, 50 Fed. Reg. 20602 (1985) (Ford); 49 Fed. Reg. 3647 (1984) (Ford); 48 Fed. Reg. 46047 (1983) (Chrysler); GM Br. at 6 n.4 and n.5.

GM installed an environmentally superior paint shop at a cost of over $200 million—far more than would have been required simply to meet the requirements of the existing Massachusetts regulations.[4]

3. The government makes much of the fact that Massachusetts requested that EPA delay action on the SIP revision for 20 days in order to allow negotiations to continue on a Delayed Compliance Order ("DCO"). (U.S. Br. 7, 21, 33). This minor 20-day delay was prompted *by EPA*, not the Commonwealth.[5] It is disingenuous for the government now to rely on a delay EPA itself initiated.

4. The government claims that EPA's policy is not to initiate enforcement until it has made a preliminary decision not to approve a SIP revision, citing EPA's December 1986 proposal. (U.S. Br. 7-8, 29 n.32). EPA did not follow any such policy here. The EPA Region I staff in Boston informed General Motors early in 1986 that it could obtain an extension of time only if it agreed to a DCO, which is an *enforcement* order, and paid substantial *penalties*.[6]

[4] *See* GM Br. at 6 & n.3. EPA and the American Lung Association testified at the Massachusetts hearings; neither opposed approval of the SIP revision. J.A. 62. EPA has set December 31, 1987, as Massachusetts' deadline for attainment pursuant to the statute. *See* 40 C.F.R. § 52.1122(d).

[5] *EPA itself* "requested that [Massachusetts] withdraw the SIP revision" altogether because EPA wanted to handle the matter "through a DCO." *See* Hanish memo, *supra*, n.1, at p. 3. When Massachusetts refused to do so, EPA requested that the Commonwealth submit a request to delay action on the SIP revision for 20 days. EPA's request was an effort to put pressure on General Motors to agree to a DCO.

[6] *See* Hanish memo, n.1 *supra*, at 1, 3; 42 U.S.C. § 7413(d). *See also* GM Br. 7, n.6. Negotiations concerning a DCO did not bear fruit because General Motors would not agree to pay penalties and insisted that the EPA Region I staff implement the Agency's 1981 policy.

The government attempts to argue that, aside from enforcement considerations, the Massachusetts SIP revision was not approvable. It asserts that the SIP revision did not require GM to limit emissions for the interim period during the 1985-1987 extension and thus failed to implement control technology as expeditiously as practicable. (U.S. Br.

In summary, the facts in this case demonstrate the pernicious effects of the absence of an enforcement bar. EPA secretly abandoned its own 1981 policy and manipulated the SIP process.[7] In doing so EPA not only ignored the Commonwealth's considered choices as to how to implement its program, but it prejudiced a company that invested over $200 million in environmentally superior technology in reliance on EPA policy.

ARGUMENT

The government's brief makes virtually no effort to explain how an enforcement action in this situation can be regarded as consistent with the primacy of state regulation embodied in the Clean Air Act. By delaying, often for years, its supposedly limited review of a SIP revision—while insisting that it may bring enforcement actions to enforce the original SIP—EPA has effectively given itself a "pocket veto" power over SIP revisions that is nowhere authorized in the statute. EPA has also precluded the states from properly meeting their own obligation to effectuate the public interest. The government's brief fails to explain how anyone—including the public, the states, or private industry—will benefit from the regulatory chaos that EPA has created.

I. THE STATUTE REQUIRES EPA TO COMPLETE ITS REVIEW OF SIP REVISIONS WITHIN FOUR MONTHS.

The government argues that the statute does not require EPA to act on a SIP revision within four months.[8] Section

7-8). This reasoning is inconsistent with EPA's 1981 policy. The policy stated that EPA "*does not recommend that states impose interim emission limitations*" on plants, but instead allow the industry "to concentrate on compliance with ultimate emission limits." (J.A. 35) (emphasis added).

[7] The Agency exercised a pocket veto to "hold the line" on SIP revisions in order to pursue its preferred enforcement goals. *See* Hanish memo, supra n.1, at p.1.

[8] It is General Motors' view that the existence of the four-month rule should not be an issue here. *See* Sup. Ct. R. 24.1(a). Contrary to the

110(a) of the statute and the unanimous weight of judicial opinion state otherwise, as do all of the various *amici* before this Court.

A. The Statutory Language Plainly Requires EPA To Act Within Four Months.

The government's brief parses the language of § 110(a)(3) of the Clean Air Act and asserts that the provision does not explicitly state that EPA must act in four months. That is correct. However, § 110(a)(3) was clearly drafted as a provision of incorporation. Indeed, § 110(a)(3), by itself, imposes virtually no requirements on SIP revisions or on EPA review of such revisions. Instead, the provision directs the reader to § 110(a)(2), the provision dealing with original SIPs, for the applicable requirements.

The government argues that since § 110(a)(3) is similar to the second sentence of § 110(a)(2), which deals with substantive standards for approval, only the second sentence should be read as incorporated in § 110(a)(3). (U.S. Br. 16).[9] However, in other cases EPA has construed the first sentence of § 110(a)(2), which includes the four-month rule, as applying to SIP revisions as well. For example, the first sentence of § 110(a)(2) expressly permits EPA to "approve or disapprove" a SIP "or any portion thereof." Section 110(a)(3), on the other hand, only grants EPA authority to

assertion in the government's brief (U.S. Br. at 14 n.11), a determination by this Court that the statute does not impose a four-month time limit would not constitute an alternative ground for affirming the First Circuit's decision. The First Circuit's decision was expressly based upon a determination that the statute *does* require EPA to act within four months.

[9] This Court has emphasized that in interpreting a statute, "we are not guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Dole* v. *United Steelworkers*, 58 USLW 4200, 4202 (Feb. 21, 1990), quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987). *See Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273, 2278 n.2 (1989). Construed as a whole, Section 110 of the Clean Air Act plainly establishes a four-month deadline for EPA review.

"approve" a revision, and makes no mention of partial approval. EPA has always interpreted § 110(a)(3) as permitting partial approval of SIP revisions,[10] an interpretation that is consistent with the overall thrust of § 110(a)(3) as incorporating *all* of the procedural and substantive authority (and limitations on authority) provided in Section 110(a)(2).

The government also points to the fact that § 110(a)(2) requires EPA to act "within four months after the date required for submission of a plan." The government asserts that this language cannot apply to SIP revisions, because revisions are never "required." (U.S. Br. 16). This argument is simply wrong. There are several circumstances in which the statute does "require" a state to submit a revision to its plan, as, for example, when national air quality standards are revised, 42 U.S.C. § 7410(a)(2)(H), or when an area has been designated as "nonattainment." 42 U.S.C. §§ 7410(a)(2)(I), 7502. (*See* U.S. Br. 4). And, of course, a state may decide for itself that a revision is "required" as a result of changes in the circumstances that underlay the policy choices embodied in the original SIP.[11]

There is every reason to believe that Congress viewed a state's *continuing* policy choices concerning SIP requirements to be just as important as its initial choices. As noted by the government, the 1977 amendments to the Act required each state containing a nonattainment area to

[10] *See Public Service Company of Indiana* v. *EPA*, 682 F.2d 626, 632 (7th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). EPA also obviously interprets section 110(a)(3) as permitting it to disapprove a SIP revision, even though, again, such authority is only granted in section 110(a)(2) and is not mentioned in section 110(a)(3).

[11] Congress clearly intended that the states, and not the federal government would take the lead in developing and evolving implementation programs under the Act. *See Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79-80 (1975); *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976).

prepare a revised SIP by July 1, 1979.[12] EPA also actively encourages the states to revise their SIPs to take into account improved technology or other changed circumstances. The same urgency applicable to original SIPs is necessary for SIP revisions if the goals of Congress are to be met.

B. The Language Of Section 110(g) Confirms The Four-Month Rule.

The Clean Air Act does in fact state expressly that EPA review of SIP revisions within four months is "required." This language appears in § 110(g) of the Act, which deals with temporary emergency suspensions. 42 U.S.C. § 7410(g). The statute requires the states to propose such suspensions as ordinary SIP revisions, but permits a state to declare a suspension unilaterally if EPA has not acted to disapprove the revision "within the required four month period.[13]

The government theorizes that the reference to the four-month requirement in § 110(g) was a mistake representing nothing more than a residual reference to a requirement in the House bill that Congress intended to delete. (U.S. Br. 19). However, nothing other than pure speculation is offered to support this theory.[14] Absent clear and convinc-

[12] 42 U.S.C. §§ 7410(a)(2)(I), 7502(b). (U.S. Br. 4). These revisions are an important component of the overall strategy for dealing with nonattainment, and EPA's suggestion that these SIP revisions are of little significance would come as quite a surprise to Congress. Far from distinguishing between original and revised SIPs, the legislative history generally emphasizes the need for expeditious action.

[13] The government asserts in its brief that Section 110(g) requires a state to wait for the entire four-month period before declaring the suspension, and that this provision should therefore be regarded as containing an exclusive remedy for EPA's failure to meet that deadline. (U.S. Br. 27). As discussed in General Motors' opening brief, the proper reading of this provision is that a state may declare a suspension at any time within the four-month period following promulgation, unless EPA has exercised its authority to disapprove the revision. (GM Br. 27 n.24.)

[14] EPA also unpersuasively argues that the Court should ignore the

ing proof that the wording of a statute is in fact a mistake, the courts do not—and should not—assume a mistake to exist.

C. The Administrative Procedure Act And EPA's Dilatory Practice Do Not Support EPA's Position That A Review Period of More Than Four Months is "Reasonable."

EPA's final argument in opposition to the four-month rule is that the Administrative Procedure Act only requires the Agency to act "within a reasonable time." 5 U.S.C. § 555. The government's argument is puzzling in view of EPA's position that it is not engaged in rulemaking under the APA in taking action on SIP revisions. 55 Fed. Reg. 5824, 5826 (1990). Moreover, this APA provision cannot override a statutory provision that establishes a specific time period for Agency action. As is discussed at length in General Motors' opening brief (at 15-17, 27-31), the four-month deadline is consistent with the very limited role that Congress intended EPA to play in reviewing SIPs.[15]

The government complains that a four-month deadline for EPA action on SIP revisions is unattainable in most cases, but its argument is self-serving and circular given EPA's refusal to review SIP revisions in the limited man-

four-month language in § 110(g) as an irrelevant statement of intent by a later Congress. (U.S. Br. 19). However, the language that EPA seeks to sweep under the carpet is neither a *post hoc* rationalization buried in the legislative history nor a coincidental wording of an entirely separate statutory provision. The cases cited on this point by the government are clearly distinguishable.

[15] Congress did not want EPA to undertake "micro-management" of the states' implementation policies. EPA has itself admitted that the extreme delays it has experienced in reviewing SIPs and SIP revisions has been the result of the Agency's insistence on such detailed management of the states' implementation requirements, in direct contravention of Congress's intent. EPA has also admitted that these delays "frustrate the development of an optimum state/federal partnership, cause confusion for sources regarding applicable regulations, and generally dampen initiative in state regulatory programs." 55 Fed. Reg. 5824 (1990), *see also* 54 Fed. Reg. 2214, 2216-17 (1989).

ner intended by Congress.[16] EPA's complaints on this subject are thus misdirected. Congress mandated EPA to act within four months. If Congress expected too much of the Agency, it is to Congress that EPA must turn for relief.

II. A BAR ON ENFORCEMENT IS THE REMEDY MOST CONSISTENT WITH THE LANGUAGE AND PURPOSES OF THE STATUTE WHERE EPA HAS FAILED TO ACT ON A SIP REVISION.

EPA's principal argument in opposition to the *American Cyanamid* bar on enforcement is that this remedy is not specifically mentioned in the statute. However, this fact begins rather than ends the discussion. It has long been one of the principal functions of the courts to design remedies, in situations where a statute is silent, in order to achieve a result consistent with the statute. *See, e.g., Moser* v. *United States*, 341 U.S. 41 (1951). This judicial function is especially important where, as here, an agency is invoking the power of the courts to support its own misconduct.

A. The *American Cyanamid* Remedy Is Consistent With The Intent Of Congress.

Contrary to the assertions in the government's brief, the Fifth Circuit in *American Cyanamid* considered both the language and the purposes of the statute very carefully.[17]

[16] It is difficult to understand why an agency with a 1989 budget of $815 million and a permanent staff of over 11,000 cannot act in a timely fashion on an average of nine SIP revisions which may be the subject of enforcement actions. *See* The Budget For Fiscal Year 1991, at A-1033; GM Br. at 25; note 27 below. EPA also makes numerous references in its brief to the requirement of OMB review. Again, however, there is no evidence that OMB is in any way responsible for EPA's delay in this case or as a general matter. *See* 54 Fed. Reg. 2214 (1989).

[17] *See American Cyanamid Co.* v. *EPA*, 810 F.2d 943 (5th Cir. 1987). The government does not suggest in its brief that this is an appropriate case for deference to the agency's interpretation of the statute. No deference can be possible to an agency's view of the appropriate remedy for the agency's own malfeasance. Nor would it be appropriate to defer to EPA's view of the four-month rule, which is a pure question of law

While that court's decision was certainly grounded in "policy" (U.S. Br. 26), the court was seeking to effectuate the policy of the statute itself. The Fifth Circuit recognized that EPA's attempt to pursue enforcement by "pocket veto" of a SIP revision is directly inconsistent with the statute. In rejecting EPA's attempt to proceed in this unlawful manner, the Fifth Circuit sought to foster the fundamental federal-state relationship established in the statute.

The government argues that the EPA should have continued authority to bring an enforcement action despite the pendency of an inconsistent SIP revision, primarily because the existing SIP remains the "applicable implementation plan" until EPA approves a revision and the Act authorizes EPA to enforce the "applicable implementation plan." (U.S. Br. 25). This argument depends upon a mechanistic reading of statutory provisions that do not deal with EPA's failure to comply with its obligation to ensure timely action on the plan selected by the state.

The statute establishes a very carefully balanced structure for the promulgation, review, and enforcement of SIPs. Under this scheme, the last step presupposes the proper completion of the first two steps.[18] Thus, both state promulgation and EPA review must be completed in full accordance with statutory requirements before enforcement is authorized. EPA's failure to review a proposed SIP revision creates a situation where there is no federal-state consensus as to the appropriate emission limits.[19] By pur-

as to which the courts are the proper authority. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-49 (1987).

[18] For example, the statute does not permit enforcement of a SIP requirement that was not properly promulgated by the state. *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983) (barring enforcement of SIP regulation found by state courts to be void *ab initio*, even though EPA had approved it). Nor may the government enforce a SIP revision that the state has promulgated but EPA has not yet approved. *See* 42 U.S.C. § 7410(d).

[19] As is discussed in detail in the *amicus* brief submitted by the Motor Vehicle Manufacturers Association, *et al.*, this ambiguity, if resolved in

suing an enforcement action before acting on a SIP revision, EPA puts the cart before the horse and frustrates the state's ability to make ongoing policy choices as well as the primary enforcement role of the state.

The government argues that the existing SIP remains the "applicable plan" until EPA approves a revision and that the Act gives EPA authority to enforce the applicable plan, quoting this Court's decision in *Train* v. *NRDC*, 421 U.S. 60 (1975). (U.S. Br. 25). The quotation that the government relies upon deals with a situation, unlike this case, where EPA has finally disapproved a SIP revision. This Court did not consider the effect on EPA enforcement of EPA's delay for years in acting on a SIP revision in the first place. *See id.* at 93 n.28. Neither the *Train* case or the language of the statute can be interpreted reasonably to give EPA a license to negate state SIP decisions through enforcement actions.[20]

B. The First Circuit's Remedy Is Inconsistent With The Statute.

The government claims that the First Circuit's approach is based on the statute, but provides little support for this argument.[21] Moreover, the government's brief fails to con-

the manner advocated by the government here, would lead to results under the statute that Congress plainly did not intend. *See* MVMA Br. 20-27; National Governors' Ass'n. Br. 9.

[20] One of the government's principal arguments against the *American Cyanamid* remedy is that it will encourage sources to obtain frivolous SIP revisions granting last-minute extensions of or exemptions from statutory requirements. Although EPA has made this argument throughout the case, it has yet to identify a single instance where such a frivolous revision has been promulgated and submitted for EPA review.

[21] Section 113(b) of the Act permits the district court, in setting the amount of penalties, to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. § 7413(b). The government asserts that EPA's failure to meet the four-month deadline constitutes one of the "other factors" to which this provision refers. However, the Agency points to no other statutory

front the very serious conflicts between the penalty adjustment remedy and other provisions of the Act. The government points out that any review of the substantive validity of EPA's decision to disapprove a SIP revision is committed by statute to the sole jurisdiction of the court of appeals and *may not be considered* by the district court[22] U.S. Br. at 29 n.32, citing 42 U.S.C. § 7607(b)(1). However, later in its brief, the government states that a district court's assessment of "prejudice" under the penalty reduction approach would necessarily take into account the *approvability* of the SIP revision:

> "Even if a delay was not deliberate, we agree that the source's good faith in complying with a *clearly approvable* SIP revision would be a factor the district court should consider in determining whether to assess penalties. Conversely, if the proposed SIP revision is *clearly deficient*, a source's reliance on it would not warrant a reduction in penalties."

U.S. Br. at 35 n.37 (emphasis added). Yet, according to the government's interpretation of the Clean Air Act, *this is a judgment that the statute expressly forbids the district court to make.*[23] The government's remedy thus presents a major jurisdictional conflict.

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language or legislative history in support of this proposition. The government's argument that the First Circuit's remedy has a more direct statutory basis than that in *Cyanamid* thus rings hollow. *See* U.S. Br. 12-13, 34-35.

[22] Moreover, EPA has always interpreted the administrative penalty provisions of Section 120 of the Act as not permitting any such adjustment. Indeed, in the district court EPA attempted to distinguish this case from *American Cyanamid* (which involved penalties assessed under Section 120) on precisely that ground. *See* EPA Mem. in Opposition to Motion for Summary Judgment at 30-31 (October 23, 1987).

[23] A similar problem would be created if this Court were to conclude, as the government urges, that EPA action on SIP revisions is governed by the "reasonable delay" standard of the APA rather than the four-month rule. The government has successfully argued that under the Clean Air Act, actions for review of the Agency's compliance with the APA may be brought only in the court of appeals. 42 U.S.C. § 7607; *Sierra Club* v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987).

C. The Fifth Circuit's Approach Is Consistent With This Court's Decision In Brock.

EPA argues that the *American Cyanamid* remedy should be rejected because it is inconsistent with this Court's holding in *Brock* v. *Pierce County*, 476 U.S. 253 (1976). As General Motors discussed in its opening brief, this case is very different from *Brock*, both in terms of the facts at hand and the legal principles to be applied. (GM Br. at 26-27).[24] There is no question in this case of barring EPA from disapproving a SIP revision if EPA has not acted within four months. Instead, the bar prevents EPA from initiating an enforcement action that is inconsistent with that review obligation. Thus, the *American Cyanamid* bar, unlike the one in *Brock*, acts to encourage the agency action (prompt EPA review of SIP revisions) to which the deadline is directed, not to discourage or prevent it. In short, the *American Cyanamid* remedy is fully harmonious with the purposes of the statute and furthers those purposes.[25]

The nature of the interests at stake are very different in *Brock* and this case. In *Brock*, the question was whether the public interest (in the form of public funds) should suffer as a result of the negligence of public officials. Under the Clean Air Act, it is for the *states*, not EPA, to decide in the first instance what the public interest is and how it should be advanced. In this case, Massachusetts decided that the public interest would best be served if General

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[24] In *Brock*, the Court carefully reviewed the statute and legislative history and concluded that a bar on recovery of funds would run directly contrary to Congress's intent in establishing the deadline, namely to encourage the Department to act in response to complaints about program abuses. 476 U.S. at 262, 264-65.

[25] Another important distinction between this case and *Brock* lies in the fact that the failure to meet the deadline in *Brock* was apparently the result of negligence rather than, as here, a deliberate decision by the agency, as a matter of policy, not even to try to meet the deadline. *See* 476 U.S. at 258.

Motors built a new, lower-emitting facility in exchange for an extension in the compliance deadline. A company should be expected to comply with such a state judgment and should not be penalized for doing so.[26]

III. THE FIRST CIRCUIT'S ALTERNATIVE REMEDIES ARE NOT "ADEQUATE".

In addition to actual and potential inconsistencies with the statute, the alternative remedies proffered by the First Circuit are not "adequate" to address the problems that EPA creates by its failure to act upon SIP revisions within four months. As discussed in General Motors' opening brief (at 40-45), actual application of either the Section 304 remedy or the penalty-reduction remedy adopted by the First Circuit would impose tremendous burdens on both EPA and the courts. The government's brief does not address these issues.

Under the First Circuit's approach, any company that finds itself in General Motors' position will be compelled to file a Section 304 action in order to protect itself. Thus, instead of simply being barred from prosecuting a handful of enforcement actions, EPA could find itself defending hundreds of Section 304 actions all across the country.[27] For an Agency that is claiming that its failure to meet the four-month deadline is largely the result of limited resources, such a "remedy" would appear to make the problem worse rather than better.[28]

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[26] *See* National Governors' Ass'n. Br. at 21. In this case, there has never been any real question of an adverse impact on the "public interest" stemming from a bar on EPA enforcement. EPA has never asserted that GM's emissions during the 1985-1987 extension caused any harm to the public. If EPA thought that the public was being harmed, it could have brought a prompt suit for injunctive relief while the old paint shop was still in operation, but did not do so.

[27] General Motors' opening brief presented EPA statistics showing that, of approximately 350 SIP revisions received each year, only *nine* have any potential effect on an enforcement action. (GM Br. 25). The government's brief does not contest the accuracy of these figures. Since affected companies cannot predict which nine are likely targets, all 350 revisions are likely to be the subject of mandamus actions.

[28] Moreover, once the court entered an order requiring EPA to act, there is no assurance that EPA would comply. Experience suggests that it would not. *See, e.g., Natural Resources Defense Council* v. *Thomas*, 705 F. Supp. 1 (D.D.C. 1988); *Sierra Club* v. *Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984).

Nor should the impact of this remedy on the courts be underestimated. Hundreds of new cases, most of which are necessitated by nothing more than a technical possibility of adverse enforcement action, will hardly be a welcome addition to the already overcrowded dockets of the federal courts. Mandamus, which is an extraordinary remedy, would become the norm.[29] And, as General Motors demonstrated in its opening brief (at 43-44), the issues that the court would have to consider in addressing such an action would inevitably lead to detailed judicial involvement in EPA management policies and the allocation of agency resources, as well as the reasonableness of EPA' delay.[30] Many of the same problems of intrusiveness and wasted resources will arise in application of the First Circuit's penalty-reduction remedy.[31]

The government asserts that an enforcement bar would not further the statutory purpose of supporting the proper balance of state and federal authority, because it might

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[29] In order to make the Section 304 remedy meaningful, the courts would have to give priority to such actions—something that many districts would find it extremely difficult to do. The Sixth Circuit concluded that mandamus is not an effective remedy. *See United States* v. *Alcan Foil Products*, 889 F.2d 1513, 1520-21 (6th Cir. 1989).

[30] Perhaps the most ironic aspect of the government's discussion of "reasonableness" lies in its implicit assertion that EPA's own internal deadline of fourteen months is itself the "reasonable" deadline. (U.S. Br. 23, 44 n.50). In this case, EPA missed this "reasonable" deadline by more than 19 months, taking 33 months to complete its review.

[31] By focusing on penalties rather than EPA's delay, the First Circuit's remedy does nothing to further the Congressional policy to achieve progress on an expeditious basis. Moreover, EPA's pocket veto leaves affected sources in regulatory limbo and prejudices their compliance efforts. Once a company is able to show prejudice as a result of EPA's delay, the focus should be on fairness to the company; the "reasonableness" of EPA's delay is irrelevant at this point. *See* National Governors' Ass'n Br. 21.

lead to "hurried and inflexible decision-making." (U.S. Br. at 33). This argument, of course, boils down to an assertion that the *American Cyanamid* remedy is not a good one because it might work, *i.e.*, because it might force EPA to comply with the statutory deadline. Obviously, the assertion that other remedies for EPA's failure to meet that deadline are better because they are less effective carries little weight.

The government also asserts that the *American Cyanamid* remedy is not necessary to preserve the integrity of, EPA's review process, noting that Congress gave both SIP review and enforcement functions to the Agency. However, Congress did not intend the Agency to manipulate its performance of the former functions in support of the latter.[32] *American Cyanamid* requires EPA to put the horse before the cart, *i.e.*, establish what the applicable SIP regulation is before trying to enforce it.[33]

IV. THE CONCERN OF CERTAIN STATE AMICI WITH THE AMERICAN CYANAMID REMEDY IS MISPLACED.

This Court has received *amicus* briefs from state and local *amicus* parties that take a variety of different positions on the statutory support for and general advisability

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[32] In this case, EPA's review of the SIP revision was inextricably intertwined from the very beginning with its desire to punish General Motors for a violation that, under the SIP revision, would not exist. *See* Hanish memo, n.1 *supra*; pages 2-3 above.

[33] EPA makes much, at several points in its brief, of the fact that a decision had been made at the *staff level* to disapprove the revision before the complaint was filed. (U.S. Br. at 8, 29 n.32). If EPA is suggesting that the staff level decision *was* EPA's decision and that subsequent review at upper levels of EPA management was irrelevant, then it is difficult to see how EPA could possibly justify the fact that the Agency took over a year to complete that allegedly meaningless review. If, on the other hand, this further review had any substantive content to it at all, then the preliminary recommendations of lower-level staff members are essentially inconsequential—except, of course, to the extent that the initiation of this enforcement action inevitably increased the pressure on EPA management to go along with the staff recommendation.

of the *American Cyanamid* remedy. Like all of the lower courts, these state and local *amicus* parties are unanimous in supporting the proposition that the statute does in fact require EPA to act on a SIP revision within four months. Their only disagreement with one another is on the appropriate remedy for EPA's failure to meet this requirement.

The Department of Environmental Quality of the State of Louisiana has expressed the opinion that the *American Cyanamid* remedy best satisfies statutory intent. ("Louisiana Brief"). A second brief was filed by a national coalition of state and local governmental officials, including the National Governors' Association.[34] The Governors' Brief urges that enforcement be permitted *only* if it were found that the SIP revision was not "approvable" and even then only prospectively. As applied in this case, the Governors' remedy, like that of *American Cyanamid*, would bar any penalties against General Motors.[35]

In a separate brief, one group of states has suggested that the First Circuit approach is the preferable one.[36] Brief

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[34] Joining in this brief are the National League of Cities, Council of State Governments, National Association of Counties, National Conference of State Legislatures, U.S. Conference of Mayors, and International City Management Association. ("Governors' Brief"). These officials are involved in the day-to-day implementation of the Clean Air Act across the United States.

[35] Governors' Brief at 20-21. Under the approach in the Governors' Brief, EPA enforcement would be conditioned on a showing by EPA that the SIP version is not approvable under the Act, with the burden of proof on EPA. *Id.* at 7, 19. Where this showing is made, EPA could seek injunctive relief to obtain a schedule of compliance as appropriate. However, the court would be precluded from imposing monetary penalties on a company that has relied in good faith on a state SIP revision. *Id.* As noted by the Governors' Brief, "a source should be expected to comply with the state-approved revision and should not be penalized for doing so." *Id.* at 21.

[36] Indeed, in a footnote on page 20 of its brief, Massachusetts takes a position even more extreme than that of the United States in suggesting that EPA should always be permitted to collect penalties during any period of delay in the Agency's review process, *even if the revision*

for the Commonwealth of Massachusetts, *et al.* ("Massachusetts Brief"). This brief, in which Massachusetts is the lead party, makes the puzzling assertion that an enforcement bar is not in the public interest.[37] Massachusetts, however, does not argue that its SIP revision was not in the best interest of its citizens, since it promulgated the revision in the first place, filed comments with EPA in opposition to the Agency's proposal to disapprove the revision,[38] and *still* believes that the revision was valid and should have been approved.[39]

It is readily apparent that the concerns in the Massachusetts Brief have virtually nothing to do with a state's interests in the process through which its own SIP is promulgated and enforced. Instead, they deal with concerns that arise from potential indirect impacts of *another* state's SIP, such as interstate pollution. The hypothetical interstate concerns addressed in the Massachusetts Brief are addressed in Section 110(a)(2) of the Act, which requires EPA to disapprove any SIP or SIP revision that fails to

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is ultimately approved. Massachusetts does not appear to recognize—and certainly makes no attempt to resolve—the very serious due process concerns that such a rule would create. No court has ever suggested such an illogical result.

[37] The Massachusetts Brief expresses a concern that an enforcement bar might deprive the state proposing the SIP of EPA's guidance concerning attainment of national standards. Obviously, a state's inability to benefit from EPA's assistance in a situation such as this stems not from a bar on retroactive enforcement of the old SIP after EPA disapproves a revision, but from EPA's failure to act on the revision promptly. An enforcement bar will certainly not exacerbate that problem; to the contrary, it should help to solve it by increasing the incentive on EPA to act promptly.

[38] A copy of the Commonwealth's January 2, 1986, letter to EPA on this subject has been lodged with the Clerk of the Court.

[39] *See* Massachusetts Br. at 6, n.3. Given this fact, it is astonishing that Massachusetts characterizes General Motors' reliance upon the revision as constituting a "knowing" violation. *Id.*, at 7, 18, 29. This *non sequitur* suggestion should be rejected out of hand, if for no other reason that it is inconsistent with the actions of Massachusetts in submitting the SIP revision.

make adequate provision against interstate pollution.[40] Where an issue concerning interstate pollution arises, only timely completion of EPA review can properly resolve any conflict between the interest of the state that has promulgated a SIP revision that it believes to be valid and the interest of another state that believes otherwise. Continued EPA authority to take enforcement action against a source that is in compliance with a revised SIP is in direct conflict with the interests of the first state and does little to resolve the concerns of the latter.[41]

By focusing on the harms it fears from the improper action of its sister states, Massachusetts is ignoring the interests that prompted it to adopt the SIP revision in the first place. In essence, it is now telling General Motors that it should not have made a commitment to the Commonwealth to build the new lower-emitting facility.[42] Should the First Circuit's remedy be upheld, that is certainly the message that will be transmitted to industries across the country.[43] As a result, industries will be increasingly un-

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[40] 42 U.S.C. § 7410(a)(2)(E). *See also* 42 U.S.C. § 7426. The Massachusetts brief does not suggest that any such issue is presented in this case.

[41] Massachusetts suggests that a Section 304 action is an adequate remedy where EPA fails to act on a revision in a timely manner. As discussed in General Motors' opening brief (at 42), we believe that this optimism is misplaced. However, if Massachusetts truly believes that a Section 304 action is an acceptable remedy, then it naturally follows that this remedy should also be more than adequate for a state that is concerned with EPA delay.

[42] The government argues that General Motors was not legally *required* to construct the new facility, despite its agreement with the state to do so, and suggests that the company therefore was not faced with a dilemma as to which approach to adopt. (U.S. Br. 37). This distinction is more theoretical than real. The SIP revision was accompanied by a permit containing a construction schedule which was *legally binding* on GM. Moreover, in many cases, SIP revisions adopted to encourage the construction of new facilities and innovative technologies specifically require those actions to be taken. *Cf. General Motors Corp. v. EPA*, 871 F.2d 495, 501 (5th Cir. 1989) (similar dilemma presented where EPA fails to act on a Delayed Compliance Order).

[43] The mere possibility that penalties *might* be reduced based on con-

willing to undertake the development and adoption of new technologies—a result that is plainly at odds with the fundamental purpose of the Clean Air Act.

The Louisiana and Governors' briefs confirm that, from the standpoint of the states and local agencies that are trying to promulgate changes to their own SIPs, the real problem is with EPA's consistent failure to complete its review of SIP revisions in a timely manner.[14] When EPA fails to act and exercises a pocket veto of the revision, its conduct destroys the cooperative federalism intended by Congress. Governors Br. at 15-16. The *American Cyanamid* ban on enforcement is the *only* remedy that is both consistent with the statute and reasonably designed to give effect to these important statutory policies.

CONCLUSION

For the reasons stated above and in General Motors' opening brief, this Court should reverse the decision of the First Circuit and remand with instructions to reinstate the District Court's summary judgment order.

Respectfully submitted,

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sideration of a variety of case-specific circumstances will be cold comfort to companies in such a situation, and few will be willing to take the chance.

[14] As Louisiana points out, prompt EPA action is vital, since it "reduces uncertainty within state environmental agencies, and the industries that they regulate, as to the status of the states' air programs and minimizes the possibility that the states will be unable to take enforcement actions to ensure compliance with their revised (and preferred) means of achieving air quality." (Louisiana Br. 16-17). Louisiana knows whereof it speaks. It was the state whose SIP revision EPA was attempting to disregard in *American Cyanamid*. Today, many years later, EPA has still not acted on that revision.